

**1321 ENDANGERING SAFETY BY USE OF A DANGEROUS WEAPON:  
OPERATING OR GOING ARMED WITH A FIREARM WHILE UNDER  
THE INFLUENCE OF AN INTOXICANT — § 941.20(1)(b)**

**Statutory Definition of the Crime**

Endangering safety by use of a dangerous weapon, as defined in § 941.20(1)(b) of the Criminal Code of Wisconsin, is committed by one who operates or goes armed with a firearm while (he) (she) is under the influence of an intoxicant.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant (operated) (went armed with) a firearm.

The term “firearm” means a weapon that acts by the force of gunpowder.<sup>1</sup>

The phrase “went armed” means that a firearm must have been on the defendant’s person or that a firearm must have been within the defendant’s reach.<sup>2</sup>

In addition, the defendant must have been aware of the presence of the firearm.<sup>3</sup>

2. The defendant was under the influence of an intoxicant at the time (he) (she) (operated) (went armed with) a firearm.

**Definition of “Under the Influence of an Intoxicant”**

“Under the influence of an intoxicant” means that the defendant’s ability to handle a firearm was materially impaired because of consumption of an alcoholic beverage.<sup>4</sup>

Not every person who has consumed alcoholic beverages is “under the influence” as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle a firearm.

It is not required that impaired ability to operate be demonstrated by particular unsafe acts. What is required is that the person’s ability to safely handle the firearm be materially impaired.

[IF APPROPRIATE, INSTRUCT ON THE EVIDENTIARY SIGNIFICANCE OF ALCOHOL TEST RESULTS. SEE WIS JI CRIMINAL 230 AND 232.]

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

This instruction was originally published as Wis JI-Criminal 1305 in 1971 and revised in 1988. It was republished as Wis JI-Criminal 1321 in 1995 and revised in 2005, 2014 and 2019. [Former Wis JI-Criminal 1321 was republished as Wis JI-Criminal 1320.] This revision was approved by the Committee in August 2021; it added to the Comment.

Section 941.20 was amended by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The title of the statute was changed from “reckless use of weapons” to “endangering safety by use of a dangerous weapon.” That is the only change that affected the subsection addressed by the instruction. The effective date of the statutory change is January 1, 1989, and this instruction replaced Wis JI-Criminal 1305 (© 1971) for offenses committed on or after that date.

This instruction is drafted for cases involving the influence of an intoxicant. For models tailored to Motor Vehicle Code offenses involving the influence of a controlled substance or the combined influence

of an intoxicant and a controlled substance, see Wis JI-Criminal 2664 and 2664A. For a discussion of issues relating to the definition of “under the influence,” see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

2003 Wisconsin Act 97 created § 941.20(1)(bm) to provide that no person may operate or go armed with a firearm “while he or she has a detectable amount of a restricted controlled substance in his or her blood.” The statute applies to offenses committed on or after the Act’s effective date: December 19, 2003. Wis JI Criminal 2664B is drafted for operating a motor vehicle with a “detectable amount . . .” and should provide a model for violations of sub. (1)(bm).

The original version of this instruction included language in element number one, that “one is not armed with a firearm unless it is loaded.” After the instruction was originally published, the Committee received several inquiries asking why the offense, unlike those for other violations of § 941.20 (see Wis JI-Criminal 1322 through 1324), required that the firearm be loaded. The footnote addressing this point in the original version of this instruction (© 1971) provided:

The use of the term “firearm” in § 941.20(1)(b) of the Criminal Code distinguishes it from the Criminal Code definition of a “dangerous weapon,” which includes an unloaded firearm. Wis Criminal Code § 939.22(10) (1969). The danger at which § 941.20(1)(b) is directed is the highly dangerous combination of an intoxicated person operating or going armed with a loaded weapon. If the individual is not intoxicated or the weapon is not loaded, the statute is not violated.

A review of the Committee’s records indicated that the last two sentences of the original footnote were added at the specific request of Assistant Attorney General William Platz. As a member of the committee that drafted Wisconsin’s Criminal Code, his interpretation of the Code was given great weight. Other members of the Criminal Jury Instructions Committee in 1971 had also been members of the Criminal Code Advisory Committee, making it likely that the instruction would have accurately reflected the intent of the legislature. Furthermore, the Wisconsin Supreme Court recognized that views of Mr. Platz (see State v. Hoyt, 21 Wis.2d 284, 299-300, 124 N.W.2d 47, 128 N.W.2d 645 (1964)) and of other members of the Criminal Code Advisory Committee “can properly be considered as ‘an authoritative statement of legislative intention.’” State v. Genova, 77 Wis.2d 141, 151, 252 N.W.2d 380 (1977), citation omitted.

In 2019, the Committee conducted a review of updated case law pertaining to the definition of “firearm” in order to reassess the requirement that the firearm be loaded. It was determined that at the time the instruction was published, no statutory definition of the term “firearm” existed, nor does one currently exist. However, in State v. Rardon, 185 Wis. 2d 701, 518 N.W.2d 330 (Ct. App. 1994) the court of appeals did provide its own definition of the term “firearm” as “a weapon that acts by force of gunpowder to fire a projectile irrespective of whether it is inoperable due to disassembly. This conclusion furthers the legislature’s intention that those convicted of a felony not be allowed to possess any firearms -- operable, inoperable, assembled or disassembled.” Although Rardon concerned Wis. Stat § 941.29(2) “Possession of a firearm,” the Committee determined that decision provided persuasive authority as to the defined term. Therefore, the Committee concluded that the requirement that the firearm be loaded be removed from the first element of the instruction.

The Wisconsin Supreme Court, applying intermediate scrutiny, refused to recognize a Second Amendment right to go armed with a firearm while intoxicated in one’s home. State v. Christen, 2021 WI 39, 396 Wis. 2d 705, 958 N.W.2d 746. “The State has important governmental interests in public safety, preventing gun violence, protecting human life, and protecting people from the harm the combination of

firearms and alcohol causes.” Id. ¶ 60. The means the legislature chose to further these important objectives is substantially related to the important governmental objectives. Id.

1. Harris v. Cameron, 81 Wis 239, 51 N.W. 437 (1892).

2. This is the definition of “went armed” used in Wis JI Criminal 1335, Carrying A Concealed Weapon. See note 2 of that instruction for cases discussing “went armed.”

3. The “aware of the presence” requirement was approved as a correct statement of the law in State v. Asfoor, where the court stated that “[c]oncealing or hiding a weapon precludes inadvertence.” 75 Wis.2d 411, 415, 249 N.W.2d 529 (1976). The concept is similar to that involved for offenses requiring “possession.” See Wis JI Criminal 920. For cases identifying “aware of the presence” as an element of the crime, see note 3 of Wis JI-Criminal 1335. The 1995 revision of that instruction added “aware of the presence” as a separate element.

4. The definition in the instruction paraphrases the full definition provided in § 939.22(42):

“Under the influence of an intoxicant” means that the actor’s ability to operate a vehicle or handle a firearm or airgun is materially impaired because of his or her consumption of an alcohol beverage, hazardous inhalant, or of a controlled substance or controlled substance analog under ch. 961, of any combination of an alcohol beverage, hazardous inhalant, controlled substance and controlled substance analog, or of an alcohol beverage and any other drug.

Note: “hazardous inhalant” was added to the definition in § 939.22(42) by 2013 Wisconsin Act 83 [effective date: Dec. 14, 2013]. Act 83 also created a definition of “hazardous inhalant” in § 939.22(15).